

sca521798.j

.FO 1

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5217 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ

2. To be referred to the Reporter or not? No.

J

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

GUJARAT KAMDAR PANCHAYAT

Versus

STATE OF GUJARAT

Appearance:

MR TR MISHRA for Petitioner

Mr. V.B.Gerania, A.G.P. for Respondent Nos. 1 and 2

SINGHI & BUCH ASSO. for Respondent No. 3, 4

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 27/07/98

### ORAL JUDGEMENT

Rule. The learned advocate for the respondents waive

service of notice of Rule. Gujarat Kamdar Panchayat has filed the present petition. The petitioner is registered trade union. It is the claim of the petitioner that on behalf of the workmen of respondent no.3 PEPSICO India Holdings Pvt. Ltd. and respondent no.4 PEPSI COLA INDIA MARKETING CO. the petitioner raised a charter of demands as regards the pay scale, perks etc. But no action has been taken by the respondents nos 3 and 4 on the charter of demands given by the petitioner on behalf of the workmen of the respondents nos 3 and 4. It is the contention of the petitioner that the workmen who are working under the Clearing and Forwarding Agents (CFAs) are, as a matter of fact workmen of respondents nos 3 and 4. According to the petitioner, the system adopted by the respondents nos 3 and 4 of employing the workmen through CFAs is a camouflage executed in order to avoid the clutches of Labour Laws. It is further claimed that they have made a representation to the respondent no.1 to raise an industrial dispute. The respondent no.1 has not taken any action on their representation presented by them on 11.3.97 and therefore, the petitioner has come before this Court seeking the following reliefs.

(A) That Your Lordships be pleased to issue an order and or direction or writ in the nature of mandamus and or any other appropriate writ, order or directions directing the respondent No.1 and 2 to immediately hold the conciliation proceedings on the demands raised by the petitioner-union, marked Annexure-A and refer the dispute to the Industrial Tribunal for adjudication.

(B) Pending admission and final disposal of this petition, Your Lordships be pleased to issue an order restraining the respondents nos 3 and No.4 Companies from terminating, discontinuing and or otherwise discharging or retrenching the existing employees engaged in selling and distribution of the Company's product"

When this petition came up for admission, respondents nos 3 and 4 had voluntarily appeared in this petition on 10.7.1998 and in the meantime as per the claim of the petitioner, the services of the workmen mentioned in Annexure .A annexed to the petition by way of an affidavit filed by one of the employees are terminated and therefore, a prayer is made to protect their services.

2. The respondents nos 3 and 4 contested the claim

of the petitioner by filing affidavit in reply as well as additional affidavit in reply. It is the claim of respondents nos 3 and 4 that the respondent no.3 is only producing soft drinks. It has no connection or control whatsoever over the sale and distribution of the soft drink produced by it. The sale, distribution and marketing of the soft drinks produced by respondent no.3 is carried out by respondent no.4 in the market. Thus it is contended that there is no privity of contract of whatsoever nature between the workmen and the respondent no.3. Consequently the petitioner cannot get and claim any relief against the respondent no.3.

3. Respondents nos 3 and 4 further contended that the respondent no.4 was initially selling the products of respondent no.3 through CFAS. The persons named in the list were employed by those CFAs and neither respondent no.3 nor respondent no.4 has got any connection as regards the employment of them. It is further contended that though the petitioner was very well aware that the workmen in question were engaged and employed by the CAF agents, the petitioner has purposely not disclosed said fact and has not also joined the persons who had actually engaged said workmen as party of this proceedings. It is further contended that though initially they were selling and distributing their products through CAF agents since July 1998 they have changed said system and they are now selling and distributing their products through distributing agents. But any way they have no connection of whatsoever nature with the employment of the said workman enlisted by the petitioner in the petition. It is further contended that initially the CAF agent was engaging persons either as route contractors or as workmen and there used to be contract of employment between those employees and CAF agent and respondent no.3 or respondent no.4 had no connection with the said contract. It is further contended that there is no termination of any employee by the respondents nos 3 and 4 either before filing of the petition and/or after filing of the petition. If at all there was any discontinuation of the engagement or employment it was by the CFAS and therefore, in the circumstances, in their absence on record, no relief could be granted to the workmen/employees.

4. On behalf of respondent no.1 Mr. Gerania learned Assistant Government Pleader submitted that as a matter of fact the competent authority has started acting on the representation made by the present petitioner and after making efforts for conciliation, if there happens to be

failure in conciliation, necessary reference would be made to the Labour Court concerned for deciding the disputes raised in the representation and the next date of hearing of conciliation proceedings is fixed on 21.8.1998.

5. It is also necessary to mention here about the development which took place after filing of the present petition. When this petition was filed it was stated that there are in all 146 employees as per the list given on page 36 to 41. Out of these 146 employees, 69 employees have given CA No. 6741 of 1998 mentioning therein that they have ceased to be members of the petitioner union. They have also withdrawn their consent and authority given to the petitioner union to raise the dispute on their behalf and that as a matter of fact, no dispute exist for them and consequently they should be treated as not represented by the petitioner union and are not parties to the present proceedings.

6. Another Civil Application No.6796 of 1998 is filed by 22 other workmen raising similar contention. Thus by these two Civil Applications out of 146, workmen, 91 workmen have withdrawn their consent present petitioner to file this petition.

7. At the outset it must be stated that a dispute which the petitioner itself has raised is depending upon the question of facts. It is the claim of the petitioner that the documents of creating C&F agency as well distribution are sham and bogus documents and they are camouflage executed in order to avoid the clutches of labour laws. In order to consider said claim raised by the petitioner it is necessary to record evidence and then to record the finding of facts and that is not possible in a writ petition under Article 226 of the Constitution of India. It must be remembered that admittedly the petitioners are not participating in any process of production of the goods produced by respondents nos 3 and 4. Respondent no.3 is producing large quantity of soft drinks. As per the claim of the petitioners, their participation is in the process of sale and distribution of the said products produced by respondent no.3 and as per the case of respondents nos 3 and 4, it could not be said that in case of selling and marketing the products, the system of engaging C&F agency as well as appointing distributors is not accepted by law or is prohibited by any provisions of law. On the contrary it is the usual practice prevailing in the marketing world and it is the common practice of all the

industries to distribute and sell their products through C&F agents as well as through distributors. No doubt the petitioners are alleging that said transactions of engaging C&FA as well as distributors are sham and bogus. But that contention of them needs investigation, recording of oral evidence and appreciation of oral and documentary evidence and that is not possible to do in a writ petition under article 226 of the Constitution of India. Admittedly the petitioners had also raised a demand the respondents nos 3 and 4 and they have also moved the competent authority under the Industrial Disputes Act making a reference of their demands to the competent authority. Therefore, in the circumstances it would not be either just or proper to go into all these questions in this petition.

8. No doubt, learned advocate for the petitioner Mr. T.R.Mishra has produced certain documents with the petition and has also invited my attention to those documents such as the bills, payment of price of the said products by cheques in the name of respondent no.4 and the certificates issued by the respondents nos 3 and 4 to some of the workmen. But if all those documents are considered in the light of the terms of the agreement between respondent no.4 and C&FA, it could not be said that any of them is contrary to the terms of the said agreement between the two. While appointing C&FA as well as giving distributorship, the respondent has put certain terms and conditions in the said agreement. As per those terms cheques must be obtained for the sale of the products in the name of respondent no.4. When the cheques are to be obtained in the name of respondent no.4, then obviously bills will have to be issued in the name of respondent no.4. It is pertinent to note that as per the terms of the agreement between C&FA Natverlal Trading Company and the respondent no.4 as well as earlier C&FA Gujarat Cold Storage, said C&FA was not purchasing the goods from either respondent no.3 or respondent no.4. If they happened to purchase the goods and they were to sell the same at a price not exceeding the price fixed by the respondents nos 3 and 4, then in that case, they would not have agreed to the said term of receiving the cheque in the name of respondent no.4 as well as issuing bills to the purchaser respondent no.4. But here the C&FA are permitted to lift the goods from the godown of respondent no.3 without paying anything and then to distribute and sell the same to various customers and they were to get only commission fixed at the rate mentioned in the agreement. Therefore, in the circumstances, issuing of the bills in the name of respondent no.4 or obtaining cheque in the name of respondent no.4 from the purchaser

could not be said to be unnatural or or indicative that the transaction is fraudulent one.

9. Mr. T.R.Mishra further brought to my notice that the workmen in question were given the uniforms bearing the logo of respondents nos 3 and 4 and the vehicles used by them for transporting the goods were also belonging to the respondents nos 3 and 4. I am not making any detailed observation about this as well as other materials as if I deal with the same in detail, there is likelihood of causing prejudice to both the parties when the parties are likely to go before the industrial court for the adjudication of their disputes. I will only say that said act of giving uniform to the said workmen by respondents nos 3 or 4 could not make prima-facie the C&AF contract between the respondent no.4 and said Natverlal Trading Company and Gujarat Cold Storage Ltd.

10. It is to be further mentioned here that the persons who have filed affidavit on behalf of the petitioner are Jitendra Vyas and R.D.Brijvas. The documents produced by the respondents nos 3 and 4 show that as a matter they have entered into an agreement with the C&FA to work as route agents. Neither in the petition nor in their affidavit they have given any explanation as regards executing this agreement as route agents for M/s Natver Trading Co. With these documents and these facts it is also necessary to mention here that out of the original petitioners, 69 petitioners of CA No. 6741 of 1998 have stated on affidavit that they were appointed as route agents and they were being paid wages and commission of route agents. Now the affidavit filed by them makes it very difficult to accept the claim of the petitioner that previously they were engaged by respondents nos 3 and 4. When the persons who were engaged along with the present petitioners are not supporting the claim of the present petitioners and on the contrary supporting the claim of contesting respondents, then at this stage it is very difficult to hold that the petitioners have got a prima-facie case in support of their claim.

11. Learned advocate for the petitioner has cited before me the cases from this High Court Court, other High Courts as well as Apex Court in support of his contention that this petition could be entertained under article 226 and the petitioner should be granted interim relief in view of the happening of subsequent event after filing of the present petition by protecting their job. I think it must be stated that almost all the cases cited by him were the cases in which the workmen were engaged

through labour contractors. It is not the case of the petitioner that any of the petitioners was engaged through the contractor by contract labour. As stated earlier, present petitioners were working only in sale and distribution of the products and that engagement of either distributors or C&FA for the distribution and sale of the products is not prohibited by any law. Therefore, all these cases cited by him will not be applicable to the facts of the case before me. I have also stated earlier few reasons for coming to the conclusion that the petitioners have failed to prove the prima-facie case in their favour for granting the relief which they are seeking in this petition. Even in case of contract labourers the Apex Court in the case of R.K. Pande vs Steel Authority of India 1994 (5) SCC 304 has observed that the question regarding the claim as to whether the contract is a mere camouflage or sham could not be decided in a writ petition under Article 226 of the Constitution and that said dispute must go before the Industrial Tribunal for trial a decision of by laying down the the following principles in para 7 of the judgment.

" It is true that with the passage of time and purely with a view to safeguard the interests of workers, many principal employers while renewing the contracts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, as has been urged in this case, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. It is not possible for the High Court or this Court, while exercising writ jurisdiction or jurisdiction under Article 16 to decide such questions, only on the basis of affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the

contract labourers and the principal employer, eliminating the contractor from the scene, is a matter which has to be established on material produced before the court. Normally, the Labour Court and the Industrial Tribunal, under the Industrial Disputes Act are the competent fora to adjudicate such disputes on the basis of the oral and documentary evidence produced before them." produced."

12. It may further be mentioned here that when the present petitioner had made representation to the competent under section 10, the petitioner had clearly admitted that the respondent no.3 had engaged 5 C&FA mentioned in the said representation and through them the workmen were working. In the representation it was the claim that they were employees of respondents nos 3 and 4. But in the affidavit filed it has been mentioned that they were employees of only respondent no.4. Similarly though the petitioner was aware that said 146 workmen were engaged through C&FA for the best reasons known to the petitioner, none of the said C&FAs was made party to this proceedings. When the petitioner was knowing that they were engaged by the C&FAs, protection of their services will be initially responsibility of the person who engaged them. No doubt they are contending that they are the real employees of respondents nos 3 and 4. But when there is not direct document or any other material to connect with respondents nos 3 and 4. Their conduct in not joining those C&FAs and subsequently concealing from the court that some of the workmen have already executed the agreement to work as route agents with the said C&FAs. The petitioners could not be said to have come with clean hands before this court. If they had come with the case that these agreements to work as route agents were obtained from them under duress or by misrepresentation or by fraud by disclosing their existence then it would been a different thing. But not to make any reference of the agreements executed by them and not making party to this petition the on the persons from whom the workmen got employment is something unusual. In the circumstances, it is very difficult to hold that the petitioners deserve any relief for protection of their services.

13. As the position stands, the concerned members of the petitioner union were engaged through C&FAs. Some of the members of the petitioner union had executed agreement to work as route agents in favour of C&FAs. Those C&FAs are not party before this Court. Thus the original members of the petitioner union who filed CAS



Nos. 6741/98 and 6796/98 have given up of any relationship of employer and employee between them and respondents nos 3 and 4 and on the contrary they made a specific claim that they were engaged in service as route agents. Therefore, it is not possible for this court to grant relief by directing the company that service of the workmen enlisted in the list filed along with the petition.

14. The respondent should expedite the hearing of the conciliation proceedings and to take his final decision on the same before the end of 30.9.98 and to intimate to the petitioner its final decision. In case if there happens to be a reference under the I.D.Act, then hearing of the said reference should be expedited by the concerned Labour Court and should decide the said reference as early as possible.

15. This will not preclude the respondents nos 3 and 4 to challenge the order of reference, if any, made by the respondent no.1.

16. Petition thus stands disposed of and Rule is made absolute in the above terms only. No order as to costs.

(S.D.Pandit.J)